Anwar et al v. Fairfield Greenwich Limited et al Doc. 131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR et al.

Plaintiffs,

- against –

FAIRFIELD GREENWICH LIMITED et al.

Defendants.

Consolidated Case
Docket No. 09 CV 00118 (VM)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE KNIGHT SERVICES HOLDINGS LIMITED AND THE AMERICAS/SWISSCO. TRUSTS FOR APPOINTMENT AS LEAD PLAINTIFFS OVER THE FEDERAL SECURITIES CLAIMS AND CONCOMITANT SELECTION OF LEAD COUNSEL

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STATUTES & RULES

Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4, *et al.* .... *passim*

Securities Exchange Act of 1934 ("Exchange Act") .... *passim*

Federal Rules of Civil Procedure
Rule 23 .... *passim*

PRELIMINARY STATEMENT

Presently, this action's operative Consolidated Amended Complaint, dated April 24, 2009 (the "Amended Complaint"), omits allegations concerning Defendants' violation of the federal securities laws. Indeed, to date, The Knight Services Holdings Limited ("Knight") is the only plaintiff who filed federal securities claims.[1] Thus, in order to protect the interests of those parties seeking relief under federal law, Knight and the Americas/SwissCo. Trusts [2] respectfully submit this memorandum in support of their motion: (a) for their appointment as Lead Plaintiffs for all purchasers of Fairfield Sentry Limited shares during the Class Period, who allege violations of federal securities laws; and (b) for approval of their selection of Wolf Haldenstein Adler Freeman & Herz LLP as lead counsel responsible for prosecuting the federal claims.

Knight filed its complaint on March 11, 2009, in part, because none of the existing complaints alleged federal securities laws violations. On March 24, 2009, this Court ordered the consolidation of Knight's claims into *Anwar et al. v. Fairfield Greenwich Limited et al.*, No. 09 cv 00118 (VM) (the "Consolidated Action"). Concerned about the lack of federal securities law allegations in the Consolidated Action, on April 2, 2009, counsel for Knight wrote this Court asking for permission for Knight to apply to be Lead Plaintiff over its federal securities law allegations. Despite having knowledge that Knight intended to pursue claims for violations of federal securities laws, Interim Co-Lead Counsel failed to include any allegations regarding federal securities claims in the Amended Complaint, which was filed three weeks subsequent to Knight's letter. Given Interim Co-Lead Counsel's decision not to pursue claims arising out of the violation of the federal securities laws, Movants believe that it is imperative for this Court to appoint Lead Counsel to prosecute these claims. Otherwise, the possibility exists that Interim Co-Lead Counsel will fail to adequately protect the interests of all members of the Class (defined below) and otherwise valuable and colorable claims will be forfeited.

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[1] A copy of the complaint filed in the actions styled *The Knight Services Holdings Ltd. v. Fairfield Sentry Ltd.*, No. 09 cv 2269 is annexed to the Declaration of Gustavo Bruckner, dated May 11, 2009, ("Bruckner Decl.") at Ex. 2.

[2] Movant Americas/SwissCo.Trusts consists of The Samba Trust, the sole shareholder of Heda Trading Ltd., by its trustee Americas Fiduciary Ltd. ("Samba"); The Casoti Trust, the sole shareholder of Casoti Overseas Ltd., by its trustee Americas Fiduciary Ltd. ("Casoti"); The Chartwell Trust, the managing Partner of Greystone Holdings, by its trustee Americas Fiduciary Ltd. ("Casoti"); and The White Chapel Trust, the sole shareholder of White Chapel Invest & Trade Ltd., by its trustee SwissCo Trust GmbH. Together Knight and the Americas/SwissCo. Trusts are referred to as "Movants".

Movants satisfy the requirements of 21D(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a) as amended by the PSLRA, for appointment as Lead Plaintiffs. Moreover, Movants satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure in that their claims are typical of the claims of the Class, and that they will fairly and adequately represent the interests of the Class. Thus, Movants respectfully request that this motion be granted.

STATEMENT OF FACTS

On December 11, 2008, Madoff was arrested by federal authorities for operating a $50 billion Ponzi scheme, in which Madoff used the principal investments of new clients to pay the fictitious "returns" of other clients. Madoff and BMIS were charged with securities fraud by the SEC. Madoff and BMIS were also criminally charged with securities fraud by the United States Attorney's Office for the Southern District of New York.

Although Madoff has been charged both civilly and criminally, Madoff was unable to perpetrate this fraud by himself. Numerous funds, investment advisors, and affiliates, including the Defendants, facilitated Madoff's fraud and committed their own violations of law by investing and allowing to be invested billions of dollars of their clients' money with Madoff and his related entities. They did so by, among other things, making false and misleading statements to existing and potential investors regarding Fairfield Sentry Limited's ("Fairfield Sentry Limited" or the "Fund") net asset value, the manner in which the Fund's assets were invested, the extent of Defendants' due diligence of Madoff and BMIS, and the true state of supervision and oversight of the Fund's assets.

Separate actions were brought against several of the Defendants alleging state law claims, including breaches of fiduciary duties, negligence, unjust enrichment, breach of contract, promissory estoppel, mutual mistake, negligent misrepresentation, rescission, and malpractice.[3] None of these actions contained any allegations of violations of the federal securities laws. On January 14, 2009, this Court consolidated the first two filed actions. On January 23, 2009, this Court consolidated the third filed case into the already consolidated cases. On January 30, 2009, this Court entered a Consolidation Order, and appointed Interim Co-Lead Counsel to prosecute the state law causes of action.

On March 11, 2009, Knight filed its complaint alleging violations of the federal securities laws - specifically which Defendants made false and misleading statements in the Fund's Offering Memorandum, private placement memorandum, website, and other documents in violation of the federal securities laws. Throughout the Class Period, Knight alleges that, among other things, Defendants made false and misleading statements regarding their investments with Madoff, BMIS, and/or Madoff-controlled entities, and in doing so operated a fraud upon the proposed Class. This federal action was brought on behalf of all persons or entities (the "Class") who acquired shares of the Fund that invested in Bernard L. Madoff ("Madoff"), Bernard Madoff Investment Securities ("BMIS"), or Madoff-controlled entities between March 11, 2004 and December 10, 2008, inclusive (the "Class Period"). Knight alleges violations of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated under Section 10(b), against, *inter alia*, Defendants Fairfield Sentry Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Limited, Fairfield Greenwich Group, PricewaterhouseCoopers, LLP, Jeffrey H. Tucker, Citco Fund Services [Europe] B.V., Citco Global Custody N.V., Andres Piedrahita, Jan Naess, Peter P. Schmid, Amit Vijayvergiya, and Walter M. Noel, Jr. (collectively, the "Defendants"). These federal securities law claims have not been asserted previously in the Consolidated Action. Importantly, the Amended Complaint does not allege claims against any auditor Defendants. On March 24, 2009, this Court consolidated the federal action with the Consolidated Action that alleged only state law claims.

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[3] The individual actions alleging state law claims that comprise the Consolidated Action are: *Anwar v. Fairfield Greenwich Group*, No. 09 cv 00118 (filed 1/7/09); *Pacific West Health Medical Center Inc. Employees Retirement Trust v. Fairfield Greenwich Group*, No. 09 cv 00134 (filed 1/8/09); *Inter-American Trust v. Fairfield Greenwich Group*, No. 09 cv 00301 (filed 1/12/09); *David I. Ferber SEP IRA v. Fairfield Greenwich Group*, No. 09 cv 2366 (filed 2/13/09); and *Laor v. Fairfield Greenwich Group*, No. 09 cv 2222 (filed 3/10/09).

ARGUMENT

I. THE COURT SHOULD APPOINT MOVANTS AS LEAD PLAINTIFFS OVER THE FEDERAL CAUSES OF ACTION

A. The Procedure Required By The PSLRA

The PSLRA establishes the procedure for appointment of the Lead Plaintiff in "each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." Sections 21D(a)(1) and (a)(3)(B), 15 U.S.C. §§ 78u-4(a)(1) and (a)(3)(B).

The plaintiff who files the initial action must publish notice to the class within 20 days after filing the action, informing class members of their right to file a motion for appointment of lead plaintiff. Section 21D(a)(3)(B)(ii), 15 U.S.C. § 78u-4(a)(3)(B)(ii). The PSLRA requires the court to consider within 90 days all motions that were filed within 60 days after publication of that notice made by any person or group of persons who are members of the proposed class to be appointed Lead Plaintiff. Sections 21D(a)(3)(A)(i)(II) and (a)(3)(B)(i), 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II) and (a)(3)(B)(i).

The PSLRA provides a presumption that the most "adequate plaintiff" to serve as lead plaintiff is the "person or group of persons" that:

> i) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
>
> ii) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> iii) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Section 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member that the presumptively most adequate plaintiff "will not fairly and adequately protect the interests of the class" or "is subject to unique defenses that render such plaintiff incapable of adequately representing the class." Section 21D(a)(3)(B)(iii)(II), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). *See also In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 436 (S.D.N.Y. 2008).

Interim Co-Lead Counsel does not meet these requirements because it failed to allege valuable claims, thus rendering it inadequate. On numerous occasions (though it had every opportunity to do so), it failed to allege violations of federal securities laws, and expressly indicated that it does not intend to pursue these claims against Defendants.

Conversely, as set forth below, Movants satisfy the criteria: Knight filed a complaint alleging federal causes of action and has filed this motion pursuant to the notice Knight caused to be published. Movants are not aware of any unique defenses that Defendants could raise against them. Therefore, Movants are the most adequate plaintiffs to represent the Class and, as a result, should be appointed Lead Plaintiffs over the federal securities claims. Furthermore, Movants are not aware of any other competing claims that allege federal securities law violations.

1. Interim Co-Lead Counsel Are Inadequate

The Rule 23 adequacy requirement, as incorporated into the PSLRA, requires that "the lead plaintiff ha[d] a sufficient interest in the outcome to ensure vigorous advocacy." *Ferrari v. Impath, Inc.*, No. 03 Civ. 5667, 2004 U.S. Dist. LEXIS 13898, at *19 (S.D.N.Y. Jul. 15, 2004). The failure of the lead plaintiff to exhaust all potential avenues for relief serves as proof that the presumptive most adequate plaintiff is not providing proper protection for the interests of the class. *Id.* at *20.

One three occasions, Interim Co-Lead Counsel indicated that they will not vigorously pursue allegations for violations of federal securities laws. First, the initial complaints failed to include these allegations. Second, in an April 7, 2009 letter to the Court, Interim Co-Lead Counsel explicitly stated that they did not intend to pursue these claims. Lastly, in their Amended Complaint, Interim Co-Lead Counsel did not include these claims. Accordingly, but for Knight, valuable claims would have been surrendered.

2. Movants Are Willing To Serve As Class Representatives

On March 11, 2009, Knight caused a notice (the "Notice") to be published pursuant to Section 21D(a)(3)(A)(i), which announced that a securities class action had been filed against, among others, Fairfield Sentry Limited, and which advised putative class members that they had until May 11, 2009 to file a motion to seek appointment as lead plaintiff. *See* Bruckner Decl. at Ex. 1. Knight has filed a complaint with a certification attached thereto attesting to its willingness to serve as representative of the Class and provide testimony at deposition and trial, if necessary. *Id.* at Ex. 2. The Americas/SwissCo. Trusts have also completed certifications attesting to their willingness to serve as representatives of the Class. *Id.* at Ex. 3. Movants have timely filed this motion pursuant to the Notice. Accordingly, Movants satisfy the first requirement to serve as Lead Plaintiffs for the Class. Section 21D(a)(3)(B)(iii)(I)(aa), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

3. Movants Meet The Requirements Of F.R.C.P. Rule 23

Movants also satisfy the adequacy and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure, which are the provisions of Rule 23 relevant to the appointment of Lead Plaintiff under the PSLRA. *See Fuwei Films*, 247 F.R.D. at 436; *Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 252 (S.D.N.Y. 2003); *Schulman v. Leminis, Ltd.*, No. 02 Civ. 1989 (DAB), 2003 WL 21415287, at *19 (S.D.N.Y. June 18, 2003). *See also Weltz v. Lee*, 199 F.R.D. 129, 133 (S.D.N.Y. 2001) (considering only typicality and adequacy on a motion for consolidation and for designation of Lead Plaintiff and lead counsel).

Movants' certifications establish that they meet the typicality requirement of Rule 23 because they: (i) suffered the same injuries as the absent class members; (ii) suffered as a result of the same course of conduct by Defendants; and (iii) their claims are based on the same legal issues. *See Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *see also In re Oxford Health Plans, Inc., Sec. Litig.*, 182 F.R.D. 42, 50 (S.D.N.Y. 1998) (typicality inquiry analyzes whether plaintiffs' claims "arise from the same conduct from which other class members' claims and injuries arise"). Rule 23 does not require that the named plaintiffs be identically situated with all class members. It is enough if their situations share a common issue of law or fact. *See In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 127 (S.D.N.Y. 1997). A finding of commonality frequently supports a finding of typicality. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (noting how the commonality and typicality requirements "merge"). Here, the questions of law and fact common to the members of the Class and which may affect individual Class members include the following:

(1) whether the federal securities laws were violated by Defendants' acts;

(2) whether Defendants omitted and/or misrepresented material facts;

(3) whether Defendants' statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and

(4) whether Defendants knew or recklessly disregarded that their statements were false and misleading.

These questions apply equally to Movants as to all members of the proposed Class. Similar to all of the other members of the Class, Movants purchased shares of Fairfield Sentry Limited, and suffered losses from these investments during the Class Period. Because Movants' claims are based on the same legal theories and "arise from the same course of conduct that gives rise to the claims of other Class members," the typicality requirement is satisfied. *See NASDAQ Market-Makers*, 172 F.R.D. at 126; *Fuwei Films*, 247 F.R.D. at 437 (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)).

B. This Court Should Follow The Structure Of The *Tremont* Cases

As outlined in Knight's April 2, 2009 letter to the Court, Movants propose that this Court look to the structure ordered by Judge Griesa in *In re Tremont Securities Law, State Law, and Insurance Litigation.*[4] *Tremont* presented a situation similar to the case at bar. That action concerns three categories of claims (federal securities claims, state law claims, and insurance claims) that allege malfeasance against a fund of funds relating to that fund's dealings with Bernard Madoff.

In order to most efficiently organize *Tremont*, Judge Griesa consolidated the three categories of cases under one master docket. He then appointed separate Lead Counsel over each category of claims. He then ordered that each category of claims file its own amended complaint. Finally, he stated that should the cases reach the discovery stage following motion practice, he would direct that discovery be coordinated to limit costs and expedite the proceedings.[5] Movants believe that a similar structure will most efficiently organize this case while, at the same time, conform to the requirements of the PSLRA.

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[4] No. 08-cv-11117 (TPG)

II. THE COURT SHOULD APPROVE MOVANTS' CHOICE OF COUNSEL

Pursuant to the PSLRA, the proposed Lead Plaintiff shall, subject to court approval, select and retain counsel to represent the Class. *See In re Donnkenny Inc. Sec. Litig.*, 171 F.R.D. 156, 158 (S.D.N.Y. 1997). The Court should not disturb the Lead Plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Selected counsel has extensive experience in successfully prosecuting complex securities actions and has frequently appeared in major actions in this and other courts. *See* Bruckner Decl., Ex. 4. In that regard, Movants request the appointment of Wolf Haldenstein Adler Freeman & Herz LLP, to serve as Lead Counsel over the federal securities law claims in this case.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court: (1) appoint Movants as Lead Plaintiffs for the federal causes of action arising out of violations of the federal securities laws; and (2) approve Movants' selection of counsel to prosecute the federal claims.

Dated: May 11, 2009

Respectfully submitted,

[5] Judge Griesa appointed Wolf Haldenstein co-interim lead counsel over the "Madoff related insurance claims."

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